Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
	)	
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Link-Up	)	WC Docket No. 03-109

To: The Commission

COMMENTS OF T-MOBILE USA, INC.

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T-Mobile USA, Inc. ("T-Mobile") responds to the Commission's Public Notice addressing proposals to modernize and adapt the universal service fund ("USF") and the intercarrier compensation ("ICC") regime to broadband services ("PN").[1]

I. INTRODUCTION AND SUMMARY

T-Mobile supports certain aspects of the three proposals addressed in the PN – the America's Broadband Connectivity Plan ("ABC Plan"),[2] Comments by the State

[1] *Further Inquiry Into Certain Issues in the Universal Service-Intercarrier Compensation Transformation Proceeding*, Public Notice, WC Docket No. 10-90, DA 11-1348 (rel. Aug. 3, 2011) ("PN").

[2] *See* Letter from Robert W. Quinn, Jr., AT&T, *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 *et al.*, Attachment 1, *Framework of the Proposal*, (filed July 29, 2011) ("ABC Plan").

Members of the Federal-State Joint Board on Universal Service ("State Member Comments"),[3] and the plan put forth by the Joint Rural Associations ("RLEC Plan").[4] T-Mobile urges the Commission, however, to make clarifications and revisions in order to fulfill its goals for USF/ICC reform and satisfy the requirements of the Communications Act of 1934 ("the Act").

The Commission should ensure expeditious transition to a low uniform ICC rate. First, the proposed five-year ICC transition to a rate of $0.0007 per minute of use ("MOU") for termination and some transport elements should be accelerated for the largest carriers and broadened to cover all termination rate elements. The exemptions for transport rate elements in the ABC Plan and Joint Letter[5] would facilitate arbitrage behavior. These exemptions would give carriers the incentive to increase rates as a way of obtaining additional revenue from competitors. To eliminate this opportunity for arbitrage, the Commission should go beyond the ABC Plan to require that *all* ICC transport and termination rates for traffic exchanges involving the three largest incumbent local exchange carriers ("ILECs") and their competitors should be reduced to bill-and-keep over a four-year transition, as T-Mobile has advocated.

If broadened to include all rate elements, the ABC Plan's ICC transition of five years would be more reasonable for smaller price cap ILECs and their competitors. Rate-

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[3] Comments by the State Members of the Federal-State Joint Board on Universal Service, WC Docket No. 10-90 *et al.* (filed May 2, 2011) ("State Member Comments").

[4] Comments of NECA, NTCA, OPASTCO, and WTA, WC Docket No. 10-90 *et al.* (filed Apr. 18, 2011) ("RLEC Plan").

[5] Letter from Walter B. McCormick, Jr., United States Telecom Association, *et al.*, to Julius Genachowski, Chairman, *et al.*, FCC, WC Docket No. 10-90 *et al.* (filed July 29, 2011) ("Joint Letter").

of-return ("ROR") ILECs could be permitted a longer transition. The alternative proposal in the PN to allow the states three years simply to develop an intrastate reform plan is simply too long, however, particularly given that reduced intrastate rates should be the first step in any ICC transition.

Second, missing from all three proposals addressed in the PN is the crucial element of an Internet Protocol ("IP") interconnection regime to pave the way for the transition to an all-IP network. The current public switched telephone network ("PSTN") imposes inefficiencies and costs that could be fully avoided if packet-based technologies were used more extensively, including the investment in and use of 21st century technologies inherent in the use of broadband networks. In order to facilitate the transformation of the PSTN to an IP network, the Commission should consider how best to address the structure, terms and conditions of voice-over-Internet Protocol ("VoIP") and other IP traffic exchanges.

Third, the intraMTA rule must be retained throughout any ICC rate transition in order to treat wireless calls or calls to wireless customers as "local" for ICC purposes. The intraMTA rule also should be updated to cover all wireless calls within a Regional Economic Area Grouping ("REAG"), now that REAGs are used as wireless license areas.

T-Mobile strongly supports the Commission's goal of limiting the size of the universal service fund. One way to limit the size of the fund is to avoid perpetuating legacy revenue streams. This goal can be advanced through careful implementation of the Access Recovery Mechanism ("ARM"). Specifically, the ARM should not be available to any ILEC that exceeds a company-wide earnings cap during a calendar year. ARM funding also should be reduced for ILECs in those states that have failed to rebalance intrastate access and local end user rates. In other words, the Commission's USF reform should provide incentives for states to continue implementation of access reform, while rewarding "early adopter" states that have already undertaken the necessary intrastate rate reforms. As an additional measure, ILECs should not be permitted to capture more ARM funding by reducing their end user charges. Furthermore, neither ARM nor USF funding should be treated as a prerequisite for ICC rate reductions. If there is insufficient funding in a given year for all scheduled USF and ARM payments, ICC rate reductions should nevertheless be implemented on schedule.

To spur the growth of broadband competition, the Commission should help ensure funding of mobile broadband at sufficient levels. Three hundred million dollars is a woefully inadequate amount for a mobility fund, given the unique consumer benefits of mobile wireless service, consumers' preference for mobile broadband service and wireless carriers' disproportionate contribution to the USF program. The greatly expanded and disproportionate Connect America Fund ("CAF") support for incumbent wireline broadband services proposed in the ABC Plan, relative to the much smaller amount of support proposed for mobile wireless broadband services, would violate the "statutory command" of competitive neutrality, as well as the requirement of technological neutrality.[6] Moreover, awarding ILECs an automatic "right-of-first-refusal" to CAF support is likely to disadvantage mobile broadband services.

Finally, T-Mobile respectfully submits that the traffic stimulation remedies proposed in the USF-ICF Transformation NPRM are administratively unfeasible and

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[6] *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 622 (5^{th} Cir. 2000) ("*Alenco*").

too lenient to be effective.[7] A more effective safeguard would be to use a terminating-to-originating traffic imbalance ratio of 3:1 as a "trigger" and to require a LEC meeting the trigger in its traffic exchanges with another carrier to reduce its tariffed and contract ICC rates to bill-and-keep, or at least to $0.0007 per MOU.

II. THE COMMISSION SHOULD ENSURE AN EXPEDITIOUS TRANSITION TO A LOW, UNIFORM INTERCARRIER COMPENSATION RATE

A. A Rapid Transition to a Low, Uniform ICC Rate Will Reduce Arbitrage and Facilitate the Transition to All-IP Networks

The current broken ICC regime extracts about $25 billion annually from consumers.[8] Wireless carriers like T-Mobile pay much of this sum to their competitors, in spite of the rapidly diminishing costs of terminating traffic. With modern switching technology, traffic sensitive termination costs are approximately zero. A speedy reduction of all ICC rates ideally to bill-and-keep ("B&K") or at the very least to a low uniform rate would harmonize the developing convergent telecommunications marketplace to the benefit of consumers. A low uniform rate would address the disparate rules that apply to different providers and types of traffic, recognize that both parties should share the cost of a call, provide correct price signals to consumers, and reflect the decreasing forward-looking costs of traffic termination.[9] A low uniform rate also would

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[7] *Connect America Fund*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4554, 4757-73 ¶¶ 635-77 (2011) ("*USF-ICC Transformation NPRM*").

[8] Comments of T-Mobile USA, Inc. at 22-23, WC Docket No. 10-90 *et al.* (Apr. 18, 2011) ("T-Mobile Comments").

[9] *Id.* at 23-26.

spur the transition to an all-IP network by removing the ILEC incentive to maintain Time Division Multiplexing ("TDM") technology in order to collect high ICC revenues.

Whether the Commission prescribes the reform framework itself or works with states to achieve reform, the transition must be quick. The three-year proposal for states merely to construct and adopt a framework for reducing intrastate access rates suggested in the PN for a state-federal framework is an unworkable approach to the pressing need for reform.[10] All ICC rates for traffic exchanges involving the three largest ILECs and competitive carriers operating in their service areas should be reduced to B&K over a four-year transition, as T-Mobile proposed.[11] Additionally, ICC rates for all other price cap ILECs and their competitors should be subject to the five-year transition set forth in the ABC Plan, with an additional step to bring those carriers' ICC rates down to B&K.[12] ROR ILECs and their competitors could be subject to an eight-year ICC rate transition, as proposed in the Joint Letter,[13] but one that covers all rate elements and brings all ICC rates down to B&K, as set forth for small ILECs in the T-Mobile Comments.[14]

For the largest ILECs, the transition should be almost complete, and for other ILECs, the transition should be well under way by the time the states likely could adopt a

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[10] PN at 12-13.

[11] T-Mobile Comments at 26-28.

[12] *See* ABC Plan at 10-11. In addition, as discussed in Part II.B *infra*, all rate transitions should include all access and other transport and termination rate elements.

[13] Joint Letter at 3 n.1.

[14] T-Mobile Comments at 29-31. In any transition plan that is adopted, where intrastate access rates are lower than interstate access rates, the Commission also should consider replacing the access unification steps with reductions in interstate access rates to the levels of intrastate access rates.

framework for intrastate access reductions under the PN proposal, which this Commission would then have to implement. Waiting three years for the states to act would be especially disruptive, given that the first step in most ICC transition proposals is to reduce egregiously excessive intrastate access rates to the level of interstate access rates.

B. The Exemption for Transport Rates Would Encourage Arbitrage

Under the ABC Plan, price cap ILEC intrastate access transport rates are reduced to interstate access transport levels at the outset of the ICC transition but are left at the interstate access levels until the end of the transition.[15] Even at the end of the transition, rates for any transport beyond the immediate tandem serving area are not altered by the ABC Plan.[16] ROR ILEC transport and tandem switching rates also would be included in the access unification steps in the ICC transition summarized in the Joint Letter but would be left at the interstate access level during and after the transition, unless otherwise determined by the Commission.[17]

This temporary exemption for transport rate elements during the ABC Plan transition, the partial transport exemption at the end of that transition, and the possibly permanent transport exemption for ROR ILECs would facilitate arbitrage behavior. In fact, arbitrage already has begun, apparently in anticipation of the Commission's adoption of the ABC Plan and the ROR transition summarized in the Joint Letter. Access tariffs that went into effect on July 1 raised some ILECs' transport rates by almost 70

[15] ABC Plan at 11.

[16] Presumably, any transport or tandem switching rates not covered by the ABC Plan, in the event that it is adopted, would continue to be regulated as they are now.

[17] Joint Letter at 3 n.1.

percent.[18] Thus, the transitions proposed for both price cap and ROR ILECs would lock into place recently increased interstate transport rates, in some cases indefinitely.

As end office rates are reduced under the transitions, ILECs will have powerful incentives to shift costs from end office functions to transport and tandem switching functions, requiring the Commission to devote additional time and effort to its scrutiny of ILEC tariff filings. Rather than spending Commission resources monitoring such cost-shifting, it would be far more efficient to remove arbitrage incentives by requiring that all rate elements – *traffic-sensitive and non-traffic-sensitive access and reciprocal compensation rate elements, monthly recurring rates and rate elements, and non-recurring rates and rate elements* – be covered by any ICC rate reduction transition.

Moreover, the access and reciprocal compensation rates that are used as the starting points in any transition should be the rates in effect as of January 1, 2011, in order to remove as much as possible the effects of any gaming of rate elements in the 2011 annual access tariff filings effective July 1 in anticipation of implementation of the proposed ICC transitions.[19] In order to limit ILECs' opportunities to exploit their termination dominance, the Commission also should reconfirm their obligations to provide transit service upon request at forward-looking cost-based rates. Section 251(a) of the Act requires all carriers to interconnect directly or indirectly, and Section 251(c)(2)(A) requires ILECs to provide interconnection to competitive carriers for the

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[18] Letter from Cheryl L. Parrino, Counsel for the Nebraska Companies, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-51 *et al.*, at 2 (July 25, 2011).

[19] For purposes of applying the transition rates, each carrier should convert its mileage and other non-traffic-sensitive rates and monthly recurring charges into per-minute rates each month, using the carrier's traffic volume for the preceding month. Non-recurring charges should be converted similarly assuming a one-year contract.

"transmission and routing" of local exchange traffic. These provisions have been held to require ILECs to provide transiting services to competitive carriers to enable the latter to interconnect indirectly.[20]

C. The FCC Should Adopt an IP Interconnection Regime

A surprising omission from the proposals addressed in the PN is any attempt to facilitate the "transition to . . . IP-to-IP interconnection."[21] As the National Broadband Plan ("NBP") points out, ILECs' "anticompetitive" interconnection practices create "a barrier to broadband deployment."[22] Both carriers and consumers alike ultimately would

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[20] *See, e.g., Qwest Corp. v. Cox Neb. Telcom, LLC*, 2008 U.S. Dist LEXIS 102032 (D. Neb. Dec. 17, 2008) (affirming Nebraska Public Service Commission order). *See also, Southern New England Tel. Co. v. Perlermino*, 53 Comm. Reg. (P&F) 189, 2011 U.S. Dist. LEXIS 48773 (D. Conn. May 6, 2011) (affirming Connecticut Department of Public Utility Control ("DPUC") order except for setting of interim transit rate methodology; DPUC may order transit service to be provided at TELRIC rate after following Section 252 procedures). State commissions have made similar findings. *See, e.g., Joint Petition for Arbitration of NewSouth Communications Corp. of an Interconnection Agreement with BellSouth Telecommunications, Inc., LLC*, 2005 Ky. PUC LEXIS 810, *21-22 (Ky. PSC Sept. 26, 2005), *rev'd on other grounds sub nom. BellSouth Telecommunications, Inc. v. Cinergy Communications Co.*, 2006 U.S. Dist. LEXIS 11535 (E.D. Ky. Mar. 20, 2006); *Application of Cox Nebraska Telecom, LLC,* 2008 Neb. PUC LEXIS 30 (Neb. PSC January 29, 2008); *Joint Petition of NewSouth Communications Corp. for Arbitration with BellSouth Telecommunications, Inc.*, 2005 N.C. PUC LEXIS 888, *127-32 (N.C. Util. Comm'n July 26, 2005); *Establishment of Carrier-to-Carrier Rules*, 2007 Ohio PUC LEXIS 572, *91-95 (Ohio PUC Aug. 22, 2007). *See also Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685, 4740 ¶ 125 (2005) ("The record suggests that the availability of transit service is increasingly critical to establishing indirect interconnection -- a form of interconnection explicitly recognized and supported by the Act. . . . Without the continued availability of transit service, carriers that are indirectly interconnected may have no efficient means by which to route traffic between their respective networks."); Letter from Thomas Jones, Counsel for Cbeyond, Inc., Integra Telcom, Inc., and tw telecom inc., to Marlene H. Dortch, Secretary, FCC, CC Dkt. No. 01-92 (July 29, 2011) (ILECs' pricing of transit services far above TELRIC-based rates impedes competition).

[21] *USF-ICC Transformation NPRM*, 26 FCC Rcd at 4717 ¶ 527.

[22] FCC, *Connecting America: The National Broadband Plan* at 49 (Mar. 16, 2010) ("NBP").

benefit from the immediate savings that would be realized if packetized voice calls did not have to be delivered to thousands of legacy circuit switch locations installed over the past century and converted to TDM for termination. As the NBP points out, ILECs "require . . . interconnecting carrier[s] to convert [VoIP] calls to [TDM] in order to collect intercarrier compensation revenue . . . . [which] hinders the transformation of America's networks to broadband."[23] This is why the *USF-ICC Transformation NPRM* recognized the need to "promote IP-to-IP interconnection."[24]

The Commission accordingly should consider how best to address the structure, terms and conditions of IP traffic exchanges. The Technical Advisory Council ("TAC"), could help determine the most efficient locations and technical standards for default VoIP Exchange Points ("VEPs") so that all IP-based voice traffic could be exchanged over the same points of interconnection ("POIs") at which all other broadband traffic is exchanged, to eliminate unnecessary duplication. There are only 31 Internet exchange points in the U.S. today, as opposed to the hundreds of thousands of POIs between and among the hundreds of ILECs and competitive carriers and other service providers in today's inefficient PSTN. Today's maze of overlapping PSTN POIs adds tremendous costs, while most tier 1 Internet providers have 10 or fewer interconnections.[25]

The Commission also might consider and request comment on an appropriate transition to a new default IP interconnection regime for various categories of carriers once there has been adequate review of the TAC's recommendations. Under such a

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[23] *Id.* at 142.

[24] *USF-ICC Transformation NPRM*, 26 FCC Rcd at 4773 ¶ 678.

[25] T-Mobile Comments at 17-20.

regime, which could be superseded by negotiated agreements, all traffic exchanged via the VEPs could be settlement free, except for whatever fee interconnected carriers should pay for deployment and maintenance of each VEP. That compensation arrangement would be similar to "peering" arrangements between tier 1 Internet providers today. An efficient IP interconnection structure would reinforce the pro-competitive effects of ICC reform.[26]

D. Wireless Traffic Should Be Treated as "Local" If It Originates and Terminates in the Same REAG.

Until the unification of all ICC rates in a single, industry-wide rate, the intraMTA rule should be retained to protect intermodal competition and the integrity of the wireless market.[27] In the *Local Competition Order*, the Commission determined that the Major Trading Area ("MTA") is the most appropriate local service area for CMRS traffic for purposes of assessing reciprocal compensation because wireless license territories are federally authorized, vary in size, and do not match wireline service areas, which are typically established by state regulators based upon wireline rate centers.[28] The Commission also should reconfirm that the rule applies to intraMTA traffic that passes through a transiting carrier.[29]

Rural ILECs ("RLECs") have complained that a single wireless carrier is abusing the intraMTA rule by disguising interMTA, non-wireless traffic as intraMTA wireless

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[26] *Id.* at 20-21

[27] 47 C.F.R. § 51.701(b)(2).

[28] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16013-14 ¶¶ 1035-36 (1996) ("*Local Competition Order*") (subsequent history omitted).

[29] *See Atlas Tel. Co. v. Oklahoma Corp. Comm'n.*, 400 F.3d 1256, 1264 (10th Cir. 2005).

traffic.[30] To the extent that any carrier abuses or deliberately misapplies the intraMTA rule, the Commission should take steps to halt such practices. Possible abuse by a single carrier, however, is an insufficient reason to abolish or otherwise weaken the intraMTA rule.

In fact, the Commission should expand the rule. Now that the Commission uses REAGs as wireless license areas, it should broaden the scope of the intraMTA rule to an "intraREAG" rule. MTAs were the basis for the original rule because they were the largest CMRS license areas granted at the time.[31] Over the past several years, however, the Commission has offered wireless licenses covering REAGs, which are much larger than MTAs. A map depicting the twelve REAGs covering the United States and its possessions is appended hereto as Attachment A. The Commission has auctioned spectrum on a REAG basis in several wireless service spectrum bands in which it seeks to foster the deployment of broadband services.[32]

The Commission has concluded that offering wireless licenses based on REAGs offers several benefits consistent with the Commission's goal of promoting broadband

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[30] *See* Letter from Michael R. Romano, Sr. V.P. – Policy, Nat'l Telecommunications Coop. Ass'n, to Marlene H. Dortch, Secretary, FCC, Docket No. 01-92, Attachment, *HALO and Intercarrier Compensation Avoidance* (July 18, 2011); Letter from Jerry Weikle, Reg. Consultant, Eastern Rural Telecom Ass'n, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 *et al.*, Attachment, *Traffic Study Results* (July 8, 2011).

[31] *Local Competition Order*, 11 FCC Rcd at 16014 ¶ 1036.

[32] *E.g.,* the 700 MHz band (C Block licenses) (*see Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, Second Report and Order, 22 FCC Rcd 15289, 15321 ¶ 74 (2007) ("*700 MHz Order*")), the Advanced Wireless Service band (D, E and F Block licenses) (*see Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, Order on Reconsideration, 20 FCC Rcd 14058, 14069 ¶ 20 (2005)), and the Wireless Communications Service (C and D Block licenses) (*see Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service*, Report and Order, 12 FCC Rcd 10785, 10814 ¶ 54 (1997) ("*WCS Order*")).

services. Specifically, the costs of acquiring a larger customer base to achieve economies of scale are lowered, allowing carriers to "offer new and innovative services, including advanced broadband services."[33] The Commission also has noted that the larger REAG areas "will speed and simplify the process of interference coordination along geographic boundaries, as well as minimize transaction costs and disputes arising from interference, and facilitate implementation of services that would require roaming capabilities and easy interoperability."[34] As the Commission predicted, carriers are actively deploying broadband services and implementing advanced technologies, such as Long Term Evolution, in these larger REAG area licenses.

In order to reflect current wireless license areas, the intraMTA rule should therefore be updated at the beginning of the transition to treat wireline-wireless and wireless-wireline traffic as local traffic if it originates and terminates in the same REAG. This modification also will facilitate the ICC transition by bringing more traffic within the more rational reciprocal compensation rules pending unification of all ICC rates. Access rates, particularly intrastate access rates, are far above cost, while reciprocal compensation rates have been trending toward forward-looking costs.[35] Finally, the

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[33] *700 MHz Order*, 22 FCC Rcd at 15321, 15324 ¶¶ 75, 82.

[34] *WCS Order,* 12 FCC Rcd at 10815 ¶ 56.

[35] In the *Local Competition Order*, 11 FCC Rcd at 15844-69 ¶¶ 672-732, the Commission held that reciprocal compensation rates should be set under a TELRIC forward-looking incremental cost methodology. Although "the transport and termination of traffic, whether it originates locally or from a distant exchange, involves the same network functions," which "[u]ltimately" "should" lead to "converge[d]" reciprocal compensation and access rates, *id.* at 16012 ¶ 1033, access rates "significantly exceed" reciprocal compensation rates (*AT&T Corp. v. Business Telecom, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 12312, 12330 ¶ 38 (2001) ("*BTI*"), *recon.*, 16 FCC Rcd 21750 (2001)), and intrastate access rates remain significantly higher than interstate access rates. *USF-ICC Transformation NPRM*, 26 FCC Rcd at 4569 n.26. Thus, access rates remain

Commission has clear authority to modify the intraMTA rule. The courts repeatedly have upheld its authority to establish pricing rules for all CMRS-LEC traffic.[36]

III. ANY ACCESS RECOVERY MECHANISM MUST AVOID LOCKING IN LEGACY REVENUE STREAMS

A. The Commission Should Adopt an Earnings Cap in Determining ILEC Eligibility for Access Recovery

If the Commission provides a mechanism for ILECs to recover revenue lost due to the reform of inflated access rates, it must make every effort to ensure that the recovery mechanism is very narrowly tailored to the Commission's goals. The ARM proposed in the ABC Plan distributes support based on historic ICC revenues "lost" due to reform, rather than the costs of serving customers in high-cost areas. It is unclear that funding any measure of revenue neutrality for ILECs is necessary "for the provision, maintenance, and upgrading of facilities and services for which [universal service] support is intended."[37] Neither the ABC Plan nor the Joint Letter propose any showing that ARM support is necessary to preserve ILEC service in any area, and in any event,

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significantly above forward-looking costs. *See also BTI*, 16 FCC Rcd at 12330 ¶ 37 (because reciprocal compensation and terminating access involve the same network functions, a carrier's reciprocal compensation rates are relevant to the reasonableness of its access rates).

Any reduction in ILEC access revenues resulting from replacing the intraMTA rule with an intraREAG rule should not be taken into consideration in calculating ILEC ARM support, discussed in Part III, *infra*.

[36] *See, e.g., Iowa Utilities Bd. v. FCC*, 120 F.3d 753, 800 n.21 (8th Cir. 1997), *aff'd in part and rev'd in part on other grounds sub nom., AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999).

[37] 47 U.S.C. § 254(e).

consumers today often have other competitive options.[38] The proposed ARM thus arguably violates the statutory principle that universal service support should "benefit the customer, not the carrier."[39]

Moreover, any universal service fund available only to ILECs, regardless of its purpose, fails to meet Section 254's "statutory command" to ensure competitive neutrality and portability, as well as the requirement of technological neutrality.[40] The ARM proposed in the ABC Plan would not be consistent with the statutory requirements of "competitively-neutral funding" and portability and would result in "protection [of ILECs] from competition, the very antithesis of the Act."[41]

If the Commission nevertheless adopts some form of an ARM, it must at least ensure that ARM support is as small as possible and that it in no event permits above-market earnings. The Commission should implement an annual total company broadband

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[38] It does not appear that the ABC Plan's proposal to limit CAF support to areas not served by an unsubsidized competitor would apply to ARM support. It does not appear that ROR carriers' CAF or ARM support would be limited to areas not served by an unsubsidized competitor.

[39] *Alenco*, 201 F.3d at 621.

[40] *Id.* at 622. The principle that the universal service program "must treat all market participants equally . . . is made necessary . . . by statute," and "portability . . . is dictated by principles of competitive neutrality and the statutory command [of Section 254(e) of the Act]." *Id.* at 616, 622. As the Commission has explained, "'competitive neutrality in the collection and distribution of funds and determination of eligibility in universal service support mechanisms is consistent with congressional intent and necessary to promote a competitive, de-regulatory national policy framework.'" *Western Wireless Corp. Petition for Preemption of Statutes and Rules Regarding the Kansas State Universal Service Fund Pursuant to Section 253 of the Communications Act of 1934,* 15 FCC Rcd 16227, 16233 ¶ 11 (2000) (citation omitted). Moreover, "a universal service funding program that restricts eligibility to ILECs. . . . may well be found to be inconsistent with and to impede the achievement of important Congressional and Commission goals." *Id.*

[41] *Alenco*, 201 F.3d at 620, 622.

and regulated service earnings review and permit access recovery only to the extent that any recovery, added to total company revenues, does not exceed a specified earnings cap.[42] The cap should be applied on a company-wide basis so that a carrier cannot claim ARM support in one or more study areas while over-earning overall.

B. The Proposed End User "Benchmarks" and ARM Should be Modified

The Commission should prevent the shifting of an unreasonable share of the burden of intercarrier rate reform to urban and other consumers by carefully designing the ILEC end-user rate "benchmarks" used in the reform plan. The ABC Plan proposes a total end user rate "benchmark" of $30 for price cap ILECs, based on the sum of the local service rate, subscriber line charge ("SLC"), and state USF contributions, that would serve as a cap on the SLC increases allowed under the plan.[43] The Joint Letter proposes an end user rate benchmark of $25 for ROR carriers.[44]

The Commission should set these benchmarks as high as is reasonable. The $30 level proposed in the ABC Plan is an absolute minimum for all ILECs; neither the ROR Plan nor the Joint Letter makes any compelling case for a lower benchmark for ROR carriers. In fact, because ROR carriers generally have higher costs, their benchmark if anything should be higher.[45]

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[42] *See* PN at 7-8.

[43] ABC Plan at 11-12.

[44] Joint Letter at 3 n.1.

[45] Because ROR carriers have higher costs than price cap ILECs, it would be consistent with the "reasonable comparability" standard for the ROR end user benchmark rate to be set somewhat *above* the *highest* amount that *any* urban consumers pay for the same bucket of charges.

The Commission previously has found that current subscriber rates are affordable and reasonably comparable. Therefore, the Commission should draft any "benchmark" rule carefully to ensure that the benchmark acts only as a one-way ratchet on ILECs' total end-user rates so that no ILEC can lower its current SLCs as a result of any cap on SLC increases. For example, if the sum of a price cap ILEC's local rate, state and local SLCs, and state USF contribution is already over a benchmark of $30, the ILEC should not be allowed to *lower* its SLC to reach the $30 threshold so as to receive ARM support.[46]

Under the ABC Plan, a carrier may receive ARM support "[t]o the extent that" its ICC reductions "exceed[] the maximum SLC *increase* permitted by the $30 benchmark. . . ."[47] If a carrier were permitted to *reduce* its SLC to reach the benchmark, it might argue that it should receive ARM support for its ICC reductions *plus* its SLC reduction. The Commission should make sure that the ARM is not manipulated in this way. Allowing ILECs to lower their end user rates and recover their costs from their competitors (or their competitors' customers) via the ARM is anticompetitive and would undermine the efficient transition to end-user recovery of costs. The Commission should make clear that, in calculating ARM support, the maximum permitted imputed SLC increase must be zero or greater.

With these clarifications, the end user rate benchmarks proposed for price cap and ROR ILECs in the ABC Plan and Joint Letter should provide adequate incentives for intrastate rate reform while rewarding "early adopter" states that have already undertaken

[46] A carrier may always reduce its local service charges, which are under the jurisdiction of state commissions (although deregulated for many ROR ILECs).

[47] ABC Plan at 12 (emphasis added).

such reform.[48] Carriers in states that have rebalanced intrastate access and local service rates will have total end user rates near or above the benchmark and thus will be allowed a minimal or no SLC increase. They will therefore be able to recover more of their ICC revenue reductions from the ARM. Carriers in states that have not rebalanced intrastate access and local rates will have to raise their SLCs more before they are allowed to recover any support from the ARM, and that support will be reduced by the amount of the SLC increases.[49]

C. The Implementation of the ARM and CAF Must Not Slow ICC Reform

The Joint Letter states that if

> sufficient funding is not expected for any reason to be available to provide the necessary levels of high-cost support and/or intercarrier compensation restructuring for carriers in any given year, any and all reductions in intercarrier compensation rates shall be deferred until such sufficient funding is confirmed to be available.[50]

The ICC rate transition is too important to be held hostage to USF funding availability. In the event funding is insufficient, the CAF transition should be slowed, and ARM support should be scaled back, but ICC rate reductions should be implemented on

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[48] *See* ABC Plan at 12; Joint Letter at 3 n.1. *See also* PN at 11-12.

[49] The PN also contains some useful proposals to supplement incentives for continued intrastate rate reform. Recalculating each carrier's total end user rate at the beginning of each year will cause that rate to reflect any increase resulting from state rebalancing of rates during the previous year. If the increase in the carrier's total end user rate puts it near the benchmark, its permitted SLC increase will be reduced accordingly, thereby increasing its allowed ARM support correspondingly. *See* PN at 11. Requiring states to contribute $2 per line to carriers' intrastate access recovery through end user rate increases also will reinforce intrastate reform incentives, *see id.* at 12, but only if a state is given "credit" for past intrastate rate rebalancing reforms.

[50] Joint Letter at 2-3.

schedule. Legacy high-cost support will remain available until the transition is complete, and new CAF support will be available to the extent that any part of the transition has begun. As a result, in the event of any funding shortfall, full funding of the ARM should take a back seat to ICC rate reductions.

D. Carriers Should Not Receive Increased ARM Support Due to Factors Unrelated to ICC Rate Reductions

The PN notes that the ABC Plan's true-ups to reflect changes in traffic volumes could cause access recovery under the ARM to increase due to trends in VoIP traffic and phantom traffic remedies.[51] The purpose of the true-ups presumably is to remove the effects of declining traffic from the calculation of carriers' ICC reductions so that carriers receive "credit" only for the impact of ICC rate reductions for the "trued-up" volume of traffic. As traffic declines from year to year, each ICC rate reduction will be calculated on a lower traffic base, reducing the calculated ICC reduction in each year. If VoIP service is reclassified as telecommunications service, however, and if remedies for phantom traffic increase the measured volumes of telecommunications traffic terminated by carriers, carriers' terminated traffic volumes will be higher at any given yearly "true-up" than they would have been otherwise. The higher volumes of traffic will inflate the calculated impact of ICC rate reductions, thereby potentially increasing carriers' ARM support.

To avoid artificially exaggerating the impact of ICC rate reductions, the proposed true-ups should not take VoIP traffic into account. Because many carriers are not receiving ICC revenue for the termination of some or all VoIP traffic, ICC rate reductions applied to such traffic during the transition will not represent an actual "loss" of ICC

[51] PN at 14.

revenues, relative to their revenues immediately prior to the beginning of the transition. Thus, in order to treat all carriers similarly, ICC revenue recovery should be based entirely on traditional TDM traffic volumes. Likewise, because carriers, by definition, are not receiving appropriate ICC revenue for terminating phantom traffic, ICC rate reductions applied to such traffic in the future will not represent an actual loss of ICC revenues.

A better approach would be the "brightline" ten percent assumed annual reduction from 2011 traffic volumes proposed in the PN.[52] Under this approach, the impact of ICC rate reductions would be assessed each year on a traffic volume assumed to be ten percent below the prior year's traffic. The ten percent annual reduction may be different from a carrier's actual traffic trend, but it will likely more accurately measure the real impact of ICC rate reform than the carrier's actual traffic volume, and all carriers will be put on an even footing by a uniform assumed traffic reduction rate.

IV. THE CAF MUST NOT IMPEDE THE GROWTH OF BROADBAND COMPETITION

A. Mobile Broadband Should Be Funded at a Sufficient Level

The ABC Plan contemplates funding of $300 million annually to support both the provision of mobile broadband service and a portion of the installation costs for satellite broadband customers.[53] As T-Mobile has explained, $300 million, which is about *ten percent* of the amount that wireless carriers contribute to the USF every year,[54] is

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[52] *Id.*

[53] ABC Plan at 8.

[54] Letter from Rebecca M. Thompson, General Counsel, Rural Cellular Association, to Marlene H. Dortch, Secretary, FCC, at 2, CC Docket No. 10-90 *et al.* (Aug. 3, 2011) ("RCA Letter").

woefully inadequate even for broadband mobility funding alone.[55] The *Broadband Availability Gap* estimated that the total "investment gap" for providing wireless broadband to the unserved population of the United States is approximately $12.9 billion and that wireless would be the least costly technology to serve 90 percent of the unserved households in the nation.[56]

The consumer benefits of mobile broadband services are reflected in market data. From mid-2009 to mid-2010, mobile broadband customers accounted for 84.3 percent of all new connections offering download speeds of at least 768 Kbps and upload speeds of more than 200 Kbps.[57] As of December 2010, there were 119 million 3G and 4G mobile broadband subscribers in the United States.[58] As Chairman Genachowski noted, "The mobile sector is critical to U.S. innovation and economic leadership in the 21st century."[59]

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[55] *See* T-Mobile Comments at 16; Comments of T-Mobile USA, Inc. at 2, 4-6, *Universal Service Reform Mobility Fund*, WT Docket No. 10-208 (Dec. 16, 2010) ("T-Mobile Mobility Comments").

[56] Omnibus Broadband Initiative, *The Broadband Availability Gap: OBI Technical Paper No. 1*, at 13, Exh. 1-J, 77 ("*Broadband Availability Gap*"), *available at* http://download.broadband.gov/plan/the-broadband-availability-gap-obi-technical-paper-no-1.pdf.

[57] Letter from Scott Bergmann, Ass't V.P., Reg. Affairs, CTIA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-51 *et al.*, Attachment, *Universal Service and Intercarrier Compensation Reform* at 3 ("CTIA Attachment") (July 29, 2011).

[58] CTIA Attachment at 4.

[59] Remarks of FCC Chairman Julius Genachowski, CTIA Wireless 2011 (Mar. 23, 2011), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-305309A1.doc. A new Deloitte L.L.P. analysis estimates that mobile wireless 4G investments could add $151 billion to gross domestic product and create 771,000 jobs by 2016. *See* D. Meyer, *Report: $53 B investment in domestic 4G could spell $151 B contribution to GDP, create 771,000 jobs*, RCR Wireless News (Aug. 22, 2011), *available at* http://www.rcrwireless.com/article/20110822/WIRELESS_FACTS_AND_FIGURES/110829999/-1/report-53b-investment-in-domestic-4g-could-spell-151b-contribution?elq=81378eda164f4286952df47af9a0297c&elqCampaignId=227.

In spite of this explosive growth in mobile broadband services and customers' rapid abandonment of wireline services, the ABC Plan and Joint Letter propose that incumbent wireline carriers receive at least \$4.2 billion out of the total proposed USF annual budget of \$4.5 billion.[60] Of that \$4.2 billion, price cap carriers would receive \$2.2 billion, which is more than *four times* the high-cost funding they receive now.[61]

This greatly expanded funding contrasts sharply with the modest \$300 million for mobile and satellite broadband funding provided in the ABC Plan and Joint Letter. Allocating such a small fraction of the total USF budget to mobile broadband would thwart consumers' overwhelming preference for mobile wireless services and the NBP's commitment to continue leading the world in mobile broadband innovation – "the next great challenge and opportunity for the United States."[62] This unbalanced approach to USF support also would fail to recognize the unique consumer benefits of mobile wireless service and would violate the statutory principles of competitive and technological neutrality.[63] In light of these factors, a more realistic funding amount

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[60] *See* ABC Plan at 2; Joint Letter at 2; RCA Letter at 2; Letter from Jonathan Banks, US Telecom, to Marlene H. Dortch, Secretary, FCC, Attachment B, *ABC Plan CAF Funding Distribution by State*, CC Docket No. 01- 92 (Aug. 16, 2011).

[61] *See* Letter from S. Derek Turner, Research Dir., Free Press, to Marlene H. Dortch, Secretary, FCC, at 1, CC Docket No. 10-90 *et al.* (Aug. 2, 2011).

[62] NBP at 9.

[63] *See Alenco*, 201 F.3d at 622.

would be about $1.3 billion, which is roughly the size of the capped CETC fund,[64] or $1.5 billion, which is about half the amount that wireless carriers contribute to the USF.[65]

One approach might be to set aside $300 million – in addition to the $300 million fund proposed in the ABC Plan for mobile and satellite broadband services – to conduct an initial auction for wireless carriers in unserved areas and then assess the resulting deployment to determine whether there is a need for additional funding for a second mobility auction. The potential anticompetitive effects of single winner auctions could be ameliorated through the use of the types of safeguards proposed by T-Mobile in its Mobility Comments, including a cap on the total amount of support that could be awarded to a single winner, including all of its affiliates.[66] In order to foreclose a large carrier from dominating reverse auctions through bids of zero or very low amounts, there also should be a cap on the total number of service areas subject to bidding at any given auction that could be covered by the bids of a single winner and its affiliates.[67]

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[64] Letter from David A. LaFuria, Counsel for United States Cellular Corp., to Marlene H. Dortch, Secretary, FCC, at 5, WC Docket No. 05-337 *et al.* (July 29, 2011).

[65] *See* Letter from Rebecca M. Thompson, General Counsel, Rural Cellular Association, to Marlene H. Dortch, Secretary, FCC, at 3, CC Docket No. 01-92 *et al.* (July 28, 2011).

[66] T-Mobile Mobility Comments at 8-9; Reply Comments of T-Mobile USA, Inc. at 20-21, WC Docket No. 10-90 *et al.* (May 23, 2011) ("T-Mobile Reply Comments").

[67] *See* Letter from Steven K. Berry, President and CEO, Rural Cellular Association, to Marlene H. Dortch, Secretary, FCC, at 1, CC Docket No. 10-90 *et al.* (May 16, 2011) (pointing out that "'zero-bids' by larger carriers could effectively wipe out competition").

B. Any Right of First Refusal Should Not Favor One Competitor or Technology Over Another

In the past, T-Mobile has opposed awarding incumbent carriers an automatic "right-of-first-refusal" ("ROFR") to CAF support.[68] A ROFR would subvert the Commission's stated goals of making eligibility for CAF support "company- and technology-agnostic"[69] and ensuring that USF reform "will not unfairly advantage one provider over another or one technology over another."[70] The relatively low ILEC eligibility standard for ROFR – availability of "high-speed Internet service" to a mere 35 percent of the service locations in a wire center – compounds the anticompetitive impact of this aspect of the ABC Plan.[71] For this reason, T-Mobile opposes a ROFR, but if the Commission nevertheless adopts such a mechanism, T-Mobile supports the PN's alternative proposal that the ROFR be awarded to the broadband provider with the

[68] T-Mobile Reply Comments at 19.

[69] NBP at 145.

[70] *USF-ICC Transformation NPRM*, 26 FCC Rcd at 4585 ¶ 82 (citation omitted).

[71] ABC Plan at 6. *See* Letter from Laurence Brett Glass, d/b/a LARIAT, to Marlene H. Dortch, Secretary, FCC, at 1, GN Docket No. 09-51 *et al.* (Aug. 6, 2011). The qualification for grant of a ROFR in a service area may be particularly lax because it applies if "the incumbent LEC that serves the wire center has already made *high-speed Internet service* available to more than 35 percent of the service locations in the wire center." ABC Plan at 6 (emphasis added). Elsewhere, the document refers throughout to "broadband service" (which it defines as 4 Mbps downstream/768 Kbps upstream). *Id.* at 2. Because the Commission defines "high-speed" Internet service as "infrastructure capable of delivering a speed in excess of 200 kbps in at least one direction" (*see Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901, 5909 ¶ 19 n.55 (2007)), the ROFR criterion does not appear to expressly require ILECs to deploy what the ABC Plan defines as broadband service in order to receive CAF broadband support.

highest number of subscribers in the relevant area.[72] That alternative approach would not only advance competitive and technological neutrality but also make more efficient use of CAF support.

C. The Rapid Pace of Mobile Broadband Deployment Argues Against Locking in Support Recipients for a Decade by January 2012

Wireless carriers are completing 4G deployments in major metro areas and will soon begin deployments in more rural areas. Given the explosive growth in mobile broadband services recently, it is reasonable to project a similarly rapid expansion of 4G mobile broadband deployment in the next few years.[73] As a result, January 1, 2012, may be too early to lock in recipients for a decade of CAF support as proposed in the ABC Plan.[74] This approach may subsidize areas where it will shortly become apparent, through the entry of an unsubsidized broadband provider, that no subsidy is needed, increasing unnecessarily the burden on all consumers. It also may undermine other providers' incentives to extend broadband into areas where one provider has a guaranteed subsidy for the next decade. Delaying the date at which CAF support is awarded to

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[72] PN at 4. *See also* Letter from Stephen F. Morris, National Cable & Telecommunications Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 *et al.*, Attachment, *Universal Service High-Cost and Intercarrier Compensation Reform for a Competitive Broadband Marketplace* at 3 (July 29, 2011) (ROFR should be awarded to company with the greatest coverage of the adjacent areas).

[73] *See* Comments of CTIA – The Wireless Association® at 5-7, GN Docket No. 10-159 (Sept. 7, 2010) (detailing wireless carriers' announced 4G deployment plans).

[74] *See* ABC Plan at 2. *See also* Letter from Jonathan Banks, US Telecom, to Marlene H. Dortch, Secretary, FCC, at 2, CC Docket No. 01-92 *et al.* (Aug. 16, 2011) (in determining areas eligible for support, ABC Plan would count unsupported providers meeting broadband definition in each area only as of January 1, 2012).

ILECs exercising their ROFR to sometime between January 1, 2014 and January 1, 2015 will help to ensure that CAF support is not awarded prematurely.[75]

V. TRAFFIC STIMULATION SHOULD BE IDENTIFIED BASED ON TRAFFIC IMBALANCES AND SUBJECT TO A RATE NO HIGHER THAN $0.0007

Traffic pumping cost the wireless industry more than $150 million in 2010 alone, and the cost is expected to rise again this year.[76] This activity is not limited to access traffic but also involves intraMTA traffic subject to reciprocal compensation. The enforcement "trigger" of a revenue sharing agreement resulting in a net payment by a LEC to another entity proposed in the *USF-ICC Transformation NPRM* is administratively unfeasible and unenforceable, and the proposed tariff refiling requirements are too lenient, inviting even more traffic pumping through regulatory endorsement.

A more effective safeguard would be a specified traffic imbalance ratio between a LEC and another carrier. The 3:1 ratio of terminating to originating traffic used for ISP-bound local traffic has been successful in halting competitive LEC ("CLEC") traffic termination arbitrage based on arrangements with ISPs, and the same ratio could be used as a reasonable trigger to impose traffic pumping remedies.[77]

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[75] At a minimum, no CAF recipient should be selected for an area until other providers have been given the opportunity to declare (confidentially, if necessary) whether they plan to extend service to that area without subsidy during the CAF build-out period (*i.e.*, five years). *See* ABC Plan at 7 (CAF recipients are required to build out broadband networks to unserved areas within five years).

[76] Comments of T-Mobile USA, Inc. at 4, WC Docket No. 10-90 *et al.* (Apr. 1, 2011) ("T-Mobile Arbitrage Comments").

[77] *Id.* at 4-7.

Moreover, once a LEC meets the specified trigger, requiring it to reduce its access rates to the level charged by the Regional Bell Operating Company ("RBOC") or largest ILEC in the state, as proposed in the *USF-ICC Transformation NPRM*, would leave CLEC access rates far too high at the inflated volumes generated by these schemes; these rates would still leave ample incentive for arbitrage. In fact, at least one traffic pumping CLEC, Northern Valley Communications, has proposed an even lower benchmark rate than that proposed by the Commission – namely, the local switching rate element – demonstrating the laxity of the Commission's approach.[78]

Thus, any LEC meeting the 3:1 ratio in the traffic it exchanges with another carrier should be required to reduce its tariffed and contract ICC rates to bill-and-keep, or, alternatively, to $0.0007 per MOU for all traffic exchanged with that carrier. The latter rate has been effective in halting arbitrage in ISP-bound traffic. Imposing bill-and-keep or at least $0.0007 on all traffic exchanged between a LEC and another carrier when the traffic imbalance exceeds a 3:1 ratio would be a clear, effective remedy for traffic pumping.[79]

Finally, the Commission should find that no tariffs filed in compliance with traffic stimulation remedies can qualify for "deemed lawful" status under Section 204(a)(3) of

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[78] *See* Comments of Bluegrass Telephone Company, Inc. d/b/a Kentucky Telephone and Northern Valley Communications, LLC Regarding Section XV of the Commission's Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking at 15-16, WC Docket No. 10-90 *et al.* (Apr. 1, 2011) (proposing that a LEC meeting a traffic stimulation trigger be required to reduce its terminating access rate to the NECA Rate "Band 1" local switching element).

[79] T-Mobile Arbitrage Comments at 7-9. This remedy would require the LEC to tariff two different sets of rates with the Commission – its standard access rates for carriers not meeting the triggering ratio and an alternative rate for carriers covered by the triggering ratio.

the Act. Once a LEC meets the 3:1 trigger, its refiled access tariff reducing its terminating access rate to $0.0007 per MOU or to zero may have the same "legal" status as any other traditional tariff but cannot be deemed lawful.[80]

VI. CONCLUSION

The Commission should implement USF and ICC reform measures consistent with these comments and T-Mobile's Comments and Reply Comments in response to the *USF-ICC Transformation NPRM*. Although some of the proposals in the ABC Plan and other reform plans addressed in the PN are consistent with the Commission's USF and ICC reform goals, other proposals should be modified as described above in order to achieve the goals of competitive and technological neutrality consistently with the Act.

Respectfully submitted,

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[80] *See Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, 12 FCC Rcd 2170, 2182-83 ¶¶ 19-20 (1997) (properly filed traditional tariffs establish the "legal" rate but are not conclusively deemed lawful), *recon.*, 17 FCC Rcd 17040 (2002).